88-889

Supreme Court, U.S.
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OCT 26 1988
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

MILLERS NATIONAL INSURANCE COMPANY;
JOHN CAULFIELD, dba CAULFIELD
TRUCKING; DONALD PRESTON THURMAN

Petitioners,

v.

AXEL'S EXPRESS, INC.

FIREMAN'S FUND INSURANCE COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO NINTH CIRCUIT COURT OF APPEALS THE COURT OF APPEALS OF CALIFORNIA

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35 pp

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does a dispute concerning liability for serious bodily injury between a motor carrier operating in interstate commerce pursuant to Federal Regulations and the owner of a vehicle leased to the motor carrier, pose a substantial question of federal law so as to vest jurisdiction in the Federal District Court?

2. Does a dispute between two insurers, one covering the motor carrier and the other covering the vehicle owner, involving coverage for liability for serious injury, which occurred during a shipment in interstate commerce, pose a substantial federal question when resolution of the dispute depends on liability under Federal Law as well as rules governing insurance of the interstate motor carrier?

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PARTIES TO THE PROCEEDING

All parties contained in the caption of this case are parties to this proceeding.

None of the petitioners in this action have or are corporate affilliates or subsidiaries or are affilliated with any other corporation.

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REFERENCE TO OPINIONS BELOW

Entry of judgment by the United States District Court, Central District of California, was entered October 9, 1987, and is reprinted in Appendix 1a.

The United States Court of Appeals for the Ninth Circuit affirming the lower entered July 1, 1988, was reported at 851 F.2d 269 (9th Cir. 1988) and is reprinted in Appendix 3a.

The Petition for rehearing was denied by United States Court of Appeals without opinion on July 28, 1988, and is reprinted in Appendix 13a.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) permitting the United States Supreme Court to review by Writ of Certiorari, a Civil Case in the Court of Appeals before or after rendition of judgment.

In cases which the petition is from a denial of petition for rehearing by the Court of Appeals, the time runs from the date of denial (Supreme Court Rule 20.4). The ninetieth day after denial is October 28, 1988. This Petition was filed on or before October 28, 1988.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the allegations of liability of motor carriers operating in interstate commerce under the Motor Carrier Act of 1980, 49 CFR 10101 et seq. and regulations codified by the Interstate Commerce Commission set forth at 49 CFR part 1057.

This case also involves the allegation of liability of the insurer of the motor carrier under the Motor Carrier Act of 1980, 49 USC §10101 et seq. and Regulations codified by the Interstate

Commerce Commission set forth at 49 CFR part 1043.

STATEMENT OF FACTS RELEVANT TO ISSUE ON REVIEW

This case arises because of an accident which occurred on June 16, 1985, in Utah. The accident resulted in severe personal injuries to JAMES GAGNER.

GAGNER was standing between his car and travel trailer parked along side the highway when a truck driven by Petitioner DONALD PRESTON THURMAN (THURMAN) struck the rear of the trailer. As a result, GAGNER'S leg was amputated and he had to undergo neurological surgery.

The tractor, driven by THURMAN was owned by JOHN CAULFIELD.

At the time of the accident, AXEL'S EXPRESS, held a certificate of public convenience and necessity issued by the Interstate Commerce Commission

authorizing AXEL'S to haul general commodities as a common carrier in interstate commerce pursuant to 49 USC 10101, et seq. (app. 7a)

At the time of the accident, CAULFIELD had leased the tractor to AXEL'S. The tractor was being operated under the control and responsibility of AXEL'S under a written lease agreement pursuant to 49 U.S.C. §11107 and the ICC Leasing Regulations set forth at 49 CFR part 1057. The identity of AXEL'S was contained on CAULFIELD'S equipment pursuant to 49 CFR §1057 (App. 7a-9a). Neither CAULFIELD nor THURMAN were licensed by any state or federal agency to conduct transportation services.

At the time of the accident, THURMAN was hauling a trailer belonging to AXEL'S. The trailer contained commodities for which AXEL'S had issued a

bill of lading from California to Salt Lake City, Utah. The accident occurred prior to delivery of the goods and while THURMAN was driving the tractor without the trailer, and attempting to retrieve his identification papers which had been left behind at the Arizona/Utah boarder check.

CAULFIELD was insured by MILLERS NATIONAL INSURANCE. AXEL'S was insured by FIREMAN'S FUND. FIREMAN'S FUND had filed a Certificate of Insurance with the Interstate Commerce Commission with the required endorsement which provides coverage for protection of the public in compliance with Title 49 U.S.C. §10927.

GAGNER filed a complaint in the Utah State Court for damages against CAULFIELD, THURMAN and AXEL'S.

A settlement was reached in the GAGNER action whereby FIREMAN'S FUND, on behalf

of its insured, AXEL'S EXPRESS, agreed to contribute $450,000 toward settlement, and MILLERS NATIONAL, on behalf of its insured, CAULFIELD and THURMAN, agreed to contribute $200,000 toward settlement of the GAGNER action. FIREMAN'S FUND AND MILLERS agreed to reserve the issue of the ultimate liability as between them as part of the settlement.

COURSE OF UNDERLYING PROCEEDINGS

MILLERS NATIONAL INSURANCE COMPANY, INTERSTATE TRUCK UNDERWRITER'S, INC., JOHN CAULFIELD dba CAULFIELD TRUCKING, AND DONALD PRESTON THURMAN, filed a complaint in the Federal District Court against AXEL'S EXPRESS, INC., and FIREMAN'S FUND INSURANCE COMPANY for damages, declaratory relief and for insurance bad faith. The parties subsequently stipulated to dismiss the cause of action for bad faith.

FIREMAN'S filed an Answer and Counterclaim against MILLERS NATIONAL INSURANCE COMPANY, INTERSTATE TRUCK UNDERWRITERS, INC., JOHN CAULFIELD dba CAULFIELD TRUCKING and DONALD PRESTON THURMAN for declaratory relief and damages.

At the pre-trial conference, for the first time, the court orally raised the question of federal subject matter jurisdiction.

At the request of the trial court, MILLERS submitted a Memorandum of Points and Authorities Regarding Jurisdiction of the U.S. District Court.

The trial court then raised additional questions of jurisdiction and issued a Further Order to Show Cause re Jurisdiction. (App. 16a).

At the request of the trial court MILLERS submitted a subsequent Memorandum

of Points and Authorities re Federal Jurisdiction of the Insurance Coverage.

On October 7, 1987, the court filed its Order of Dismissal on the basis the question of liability among the motor carrier and the owner/operator was no longer at issue and that the court had no jurisdiction of any dispute between the insurers. (See Appendix 1a-2a).

MILLERS filed an appeal to the U.S. Court of Appeals for the Ninth District on November 9, 1987. The Court of Appeals affirmed the trial courts ruling on July, 1, 1988 (App 5a). The request for rehearing was denied without opinion on July 28, 1988 (App. 5a).

BASIS OF FEDERAL JURISDICTION OF FIRST INSTANCE

The subject matter of this Petition is of Federal Jurisdiction of First Instance.

CONSTITUTIONAL PROVISIONS - Statutes and Regulations

Relevant Text of Statutes and Regulations are Set Out in Appendix A.

A. United States Code

Motor Carrier Act of 1980
49 USC §10101 et seq.

1. 49 USCS 10101 (app. 20a)

2. 49 USCS 10927 (app. 23a)

3. 49 USCS 11107 (app. 24a)

B. U.S. Code of Federal Regulation

1. Interstate Commerce Commission Equipment Regulation 49 CFR Part 1043 (app. 27a)

2. Interstate Commerce Commission Insurance Regulations 49 CFR Part 1057 (app. 30a)

ARGUMENT IN FAVOR OF ALLOWING WRIT

This case presents an important question of subject matter jurisdiction: Does the Federal District Court have jurisdiction to determine the liability of a motor carrier regulated by a federal

agency and whose conduct and liability is strictly governed by federal law. A second equally important question is whether questions involving insurance coverage in a dispute involving a federally regulated motor carrier is the subject matter jurisdiction of the Federal District Court. The trial court and the Court of Appeals incorrectly held that the issue of the motor carrier's liability was not at issue since the third party had already been compensated. The Court of Appeals also incorrectly applied the Supreme Court decisions in Merrell Dow Pharmaceuticals, Inc. vs. Thompson, 478 U.S. 804; 92 L.Ed.2d 650, 54 U.S.L.W. 5088; 1065 S.Ct. 3229 (1986) and Smith v. Kansas City Title & Trust Co. 255 U.S. 180 (1921), by holding that the issues of insurance coverage of a motor carrier do not arise under federal

law.

This court should grant certiorari so as to clarify (1) whether a cause of action to determine liability of a motor carrier regulated by the Interstate Commerce Commission is a substantial federal question vesting jurisdiction in the Federal District Court, and (2) whether a cause of action to determine liability of an insurer of a motor carrier regulated by the Interstate Commerce Commission is a determination of a substantial federal question vesting jurisdiction in the Federal District Court.

I

WHERE FEDERAL STATUTE AND REGULATIONS GOVERN THE LIABILITY OF A MOTOR CARRIER FOR DAMAGES CAUSED BY A LEASED VEHICLE, A DETERMINATION OF THE MOTOR CARRIER'S LIABILITY IS A DETERMINATION OF A "SUBSTANTIAL" FEDERAL QUESTION SO AS TO VEST SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT.

A. THE DETERMINATION OF LIABILITY OF THE MOTOR CARRIER IS A SUBSTANTIAL FEDERAL QUESTION AND DENYING FEDERAL JURISDICTION OVER THE ISSUE WOULD BE INCONSISTENT WITH THE RULE CITED IN SMITH vs. KANSAS CITY TITLE & TRUST CO. 275 U.S. 180 (1921) and MERRELL DOW PHARMACEUTICALS, INC. vs. HENDERSON, 478 U.S. 804; 92 L.Ed.2d. 650; 51 U.S.L.W. 5088; 106 (1986).

Pursuant to the Commerce Clause, Congress and the ICC have preempted common law and state law concerning the liability of independent contractors by holding motor carriers statutorily liable

for the acts of a leased driver and vehicle. Proctor & Colonial v. Refrigerator Transportation Inc., 494 F.2d 89 (4th Cir. 1974).

Congress created the ICC and the laws governing motor carriers in order to develop a sound uniform transportation system. Simmons v. King 478 F.2d 857 (5th Cir. 1973).

For the purpose of insuring uniformity of commerce among the several states, the commerce clause of the Constitution provides that Congress shall have the power to "Regulate Commerce with Foreign Nations and Among the Several States". Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465 (1885); Wellon v. State of Missouri, 91 U.S. 275 (1875); Cook v. Pennsylvania, 97 U.S. 275 (1878); Cook v. Marshall County 196 U.S. 201 (1904).

Pursuant to the commerce clause,

Congress empowered the Interstate Commerce Commission to regulate transportation conducted between a place in one state to a place in another state. (49 U.S.C. §10521(a)). Congress also prohibited transportation in interstate commerce unless an appropriate license had been obtained from the Interstate Commerce Commission. (49 U.S.C. 10927, et seq).

Pursuant to 49 U.S.C. §11107, the ICC promulgated the leasing regulations regulating the leasing of Motor Vehicles by Motor Carriers. (49 CFR part 1057).

The leasing regulations contain an extensive set of rules which permits the motor carrier to provide transportation services through the use of leased equipment and drivers. The relevant portions of these regulations include: requirements that the lease be in

writing. 49 CFR 1057. 11(a); that receipts be provided for possession of the equipment, 1057.11(b); that the leased equipment contain the identification of motor carrier 1057.11(c); that the motor carrier assume exclusive possession and control of the equipment, 1057.12(c); and that the motor carrier maintain insurance coverage for the leased vehicle, 1057.12(i).

The leasing regulations established by the Interstate Commerce Commission were thoroughly discussed in Transamerica Freight Lines, Inc. v. Brada Miller Freight Systems, Inc. 423 U.S. 28 (1975). After review of the history of these regulations, the court in Brada Miller recognized that the importance of the leasing regulation was to enforce the motor safety regulation and to fix financial responsibility for damage and

injuries to shippers and members of the public (423 U.S. 28.37).

Despite the wishes of Congress, review of State Court and Federal decisions reveals a lack of uniformity in deciding the liability of motor carrier vs. the vehicle owner/lessor (Rodriguez v. Ager (10th Cir. 1983) 705 F.2d 1229).

A cause of action will arise under a Federal law vesting Federal jurisdiction over a claim in two situations; one, if the Federal Statute expressly creates a cause of action. Franchise Tax Board v. Construction Laborer's Vacation Trust, 463 U.S.1 (1983) at 8-9, or second, when there appears that some substantial disputed question of Federal Law is a necessary element of one of the well-pleaded state claims. Franchise Tax Board vs. Construction Laborers Vacation Trust, 463 U.S. at 13. The type of claim

which will create a substantial federal question was described in Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). "The General Rule is that where it appears from the bill or statement of the complaint that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, under the statute granting federal question jurisdiction" 223 U.S. at 199.

The Court of Appeals cited the Supreme Court's recent decision of Merrell Dow Pharmaceuticals Inc. v. Henderson 470 U.S. 804; 92 L.Ed.2d 650, 511 U.S.L.W. 5088 (1986) to support its decision that the issue of insurance coverage under a motor carrier's policy does not arise under federal law (App 11a). The Merrell

Dow decision held that a state cause of action for product liability which alleges violation of the labeling requirement of the Food and Drug Act as an element of that action does not "arise under" the Federal law in statute so as to vest jurisdiction in the Federal District Court. The court in Merrell Dow concluded that since Congress did not provide for an express cause of action under the Food and Drug Act, the Act was not a substantial federal interest so as to vest jurisdiction in the federal court. (478 U.S. 812).

The decision in Merrell Dow, however, did not eliminate the "Arising under" jurisdiction when the Federal Statute fails to create an owner's cause of action, as was suggested by the Court of Appeals (App. 10a). Justice Brennan argued in his dissent of MERRELL DOW,

that the Rule of Smith v. Kansas City Title & Trust was not overruled by Merrell Dow. 478 U.S. 820.

The federal issue in the present case is not merely an element of a state cause of action. The Federal Regulatory Scheme creates strict liability on the motor carrier for the conduct of drivers of leased equipment. Proctor & Colonial v. Refrigerator Transportation, Inc., 91 F.2d 89 (1974). The driver is deemed to be the employee of the motor carrier so as to assure the general public an adequate avenue of recourse in the event of injury.

The Rule of Smith was not properly applied to the cause of action to determine liability of AXEL'S under the Federal Regulatory Scheme. This Petition should be granted to properly consider the jurisdiction of that claim.

B. THE TRIAL COURT AND THE COURT OF APPEALS INCORRECTLY CONSIDERED THE ISSUE BEFORE THEM BY ONLY CONSIDERING THE ISSUE OF INSURANCE COVERAGE.

The trial court recognized that the determination of liability of a motor carrier regulated by the Interstate Commerce Commission to the insurers caused by a leased vehicle is a substantial federal question and vests jurisdiction in the District Court. (See Appendix 2A) The trial court incorrectly held, however, that the determination of the motor carrier's liability was no longer at issue and that only the issue of insurance coverage was at issue[1]. (See Appendix 2A).

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[1] It is further alleged by petitioner that the determination of insurance coverage also is a substantial federal question.

The court's assessment that the motor carrier's liability is no longer at issue is incorrect. As discussed in Part A of this argument, the Federal Regulatory Scheme requires the motor carrier to assume complete control and responsibility of a leased vehicle and its driver. In order to ensure the safety of the public from the operations of motor carriers utilizing non-owned equipment, Congress empowered the ICC to enact regulations which would permit the motor carriers use of non-owned equipment on the conditions that the motor carrier assumes control and responsibility of the motor vehicle and obtain liability insurance of the vehicle (49 U.S.C. §11107, Indiana Refrigerator Lines, Inc. v. Dalton (1975 Cal.App.6 Tenn.), 516 F.2d 795, Cert. denied, 423 U.S. 985, 46 L.Ed. 302, 96 S.Ct. 392 (1975). Further

in its authority over interstate commerce, Congress required the ICC to issue operating authority only to carriers that maintain insurance to pay for any final judgments against the carrier for bodily injury resulting from the negligent operation of a motor carrier under the issued authority (49 U.S.C §10927).

Based on this regulatory scheme, the motor carrier is liable for injuries to the third party caused by the driver of the leased vehicle while operated on behalf of the motor carrier. The vehicle lessor is responsible for its own negligence directly causing the injuries, but is not legally liable for the conduct of the driver of the vehicle leased to the motor carrier. By the terms of the motor carrier's insurance policy and by Federal regulations, the motor carrier's

insurer must assume coverage for the operation of the leased vehicle. Finally the insurer of the leased vehicle's owner does not provide coverage for damages caused while the vehicle is leased to the motor carrier and for vehicles for which the motor carrier is held liable.

Based on these regulations, the issue of the motor carrier's liability is primary to that of the insurer's coverage and must be decided before the question of insurance coverage can be decided. Both the factual paragraph and the introductory paragraph to the discussion by the Court of Appeals recognized Petitioner's argument that the purpose of this lawsuit is to determine the liability of the motor carrier and that such determination must be made prior to deciding the issue of insurance coverage. The Court of Appeals, however, reached

its decision to deny jurisdiction by applying the rule of "Substantial Federal Question" cited in Merrell Dow vs. Thompson to the question of insurance coverage (See Appendix 11A). The question of whether liability of the motor carrier is a "substantial Federal question" was never fully addressed.

C. THE ISSUE OF INSURANCE COVERAGE IS ALSO AN IMPORTANT FEDERAL INTEREST WHICH MUST BE ENFORCED ON A UNIFORM BASIS SO AS TO CREATE A UNIFORM TRANSPORTATION SYSTEM.

In response to 49 USC §10927, the ICC has devised an expansive set of regulations which requires a motor carrier to assume full coverage for injuries occurring during the operation of motor vehicles operating under the

insurer's carrier's policy. 49 CFR 1043 app. 27a, 49 CFR 1057.12(C) app. 29a.

Just as courts have differed on the effect of ICC leasing regulations on the liability of the motor carrier/lessee, State and Federal Courts have also radically differed on the interpretation of the laws concerning insurance coverage for regulated motor carriers.

One line of cases has held that a motor carrier's public liability policy is primary to that of the vehicle owner's policy due to the public liability endorsement required by 49 U.S.C. 10927 and, 49 CFR part 1043. Argonaut Insurance Co. v. National Indemnity Co., 435 F.2d 710 (10th Cir. 1971).

Another line of cases has held that a motor carrier's insurance policy only provides excess coverage and that coverage was not altered by the attached

ICC endorsement. Hagans vs. Glen Falls Insurance Co., 465 F.2d 1249 (1972); (Paxton National Insurance Co., Transport Indemnity Insurance, 657 F.2d 656, 659-60 (5th Cir. 1981), Cert. denied, 455 U.S. 657 (1982). (It should be noted that Justice White would grant Certiorari in Paxton National Insurance vs. Transport Indemnity to resolve the conflict between the decisions of Argonaut Insurance Co. v. National Indemnity Co. and Hagans vs. Glens Falls Insurance Co. 465 F.2d 1249 (1972).

Allowing individual courts to interpret these federal regulations could very well cancel out the intent of Congress that the motor carrier assume the financial responsibilities of its operation.

The issue of insurance coverage by an insurer of a motor carrier for the

liability to the public is a substantial federal interest which requires uniformity in its enforcement by the Federal District Court.

DATED: 10/25/88

FARANO AND KIEVIET

C. M. Farano

CHARLES M. FARANO

88-889

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

MILLERS NATIONAL INSURANCE COMPANY;
JOHN CAULFIELD, dba CAULFIELD
TRUCKING; DONALD PRESTON THURMAN

Petitioners,

v.

AXEL'S EXPRESS, INC.

FIREMAN'S FUND INSURANCE COMPANY,

Respondents

APPENDIX TO PETITION
WRIT OF CERTIORARI

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B. Relevant Statutes and Regulations

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILLERS NATIONAL INSURANCE COMPANY, et al., Plaintiffs, vs. AXEL'S EXPRESS, INC., et al., Defendants.	NO. CV 86-6592 AWT ORDER OF DISMISSAL
AND RELATED COUNTERCLAIM.	

This is an action to obtain a declaration of rights and liabilities as between insurers. Jurisdiction is predicated under 28 U.S.C. §§1331 & 1337. There is no diversity of citizenship.

Because, at the pretrial conference, the Court was not satisfied that it had subject matter jurisdiction, further

briefing was ordered on the issue (twice) and the matter was argued. The Court has concluded that it has no jurisdiction.

As between lessor and lessee (the truckers), the Court may have "arising under" jurisdiction under 49 U.S.C. §11107(a)(4) and the regulations promulgated thereunder, 49 C.F.R. Part 1057. See Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983). However, this would not give the Court jurisdiction of any dispute between the insurers, because they would be pendent parties. See, e.g., Carpenters So. Cal. Admin. Corp v. D & L Camp Constr. Co., 738 F.2d 999 (9th Cir. 1984).

Moreover, because the dispute with the third-party claimant, James Gagner, has been settled, the truckers no longer have any interest in this matter -- with respect to Caulfield, Thurman and Axel's,

the action is now moot. All that remains is purely a dispute between insurance carriers as to who is primarily liable for coverage.

That dispute does not arise under federal law. See Transamerica Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28, 39-40 (1975); Grinnell Mut. reins. Co. v. Empire Fire & Marine Ins. Co., 722 F.2d 1400, 1404 (8th Cir. 1983), cert. denied, 466 U.S. 951 (1984); Carolina Cas. Ins. Co. v. Underwriters Inc. Co., 569 F.2d 304, 313 (5th Cir. 1978); contra, Argonaut Ins. Co. v. National Indem. Co., 435 F.2d 718 (10th Cir. 1971) (predating Brada Miller). As these cases demonstrate, not every case which may involve the interpretation of some federal statute or regulation "arises under" federal law. See generally Franchise Tax Bd. v.

Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

IT IS ORDERED that this action is DISMISSED without prejudice for lack of subject matter jurisdiction.

Dated: October 7, 1987

A. WALLACE TASHIMA
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILLERS NATIONAL INSURANCE COMPANY; JOHN CAULFIELD, dba Caulfield Trucking; DONALD PRESTON THURMAN,
Plaintiffs-Counter-Defendants-Appellants,

and

INTERSTATE TRUCK UNDERWRITERS, INC.,
Plaintiff-Counter-Defendant,

v.

AXEL'S EXPRESS, INC.,
Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Defendant-Counter-Claimant-Appellee.

No. 87-6606
D.C. No. CV-86-6592-AWT
OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
May 4, 1988—Pasadena, California

Filed July 1, 1988

Before: Procter Hug, Jr., Alex Kozinski and David R. Thompson, Circuit Judges.

Opinion by Judge Hug

SUMMARY

Jurisdiction/Insurance/Motor Carriers

The court affirmed the district court's judgment dismissing the action for a lack of jurisdiction. The court held that the district court did not have federal-question jurisdiction.

Appellant Donald Thurman was involved in an accident while driving a truck owned by appellant Caulfield Trucking and leased to appellee Axel's Express. After the personal injury action was settled, appellant Millers National Insurance Co., Caulfield's and Thurman's insurer, filed a complaint alleging that Axel's was exclusively liable for the damages. The district court dismissed the action, finding there was no federal subject matter jurisdiction.

[1] Under federal law, Axel's was required to file an insurance policy or security before operating the truck in interstate commerce. [2] Though resolution of this action may involve a determination of federal law, that alone is not sufficient to invoke federal-question jurisdiction. [3] There is nothing in the regulations or the federal statute that deals with the question of allocating liability between the insurers of an owner and a carrier. Congress did not intend to provide a federal private right of action to insurers of carriers for indemnification.

COUNSEL

Charles M. Farano and Jeffrey L. Farano, Farano and Kieviet, Anaheim, California, for the appellants.

Kurt A. Moll, Rigg and Dean, Santa Ana, California, for the appellees.

OPINION

HUG, Circuit Judge:

This is an appeal from a dismissal for lack of jurisdiction. The sole issue is whether a federal district court has federal-question jurisdiction over a dispute between two insurance companies for coverage of an accident involving an interstate motor carrier regulated under federal law. We affirm.

FACTS

On June 16, 1985, Donald Thurman was driving a truck owned by Caulfield Trucking ("Caulfield") and leased to Axel's Express, Inc. ("Axel's"). Axel's was a common carrier authorized by the Interstate Commerce Commission ("ICC") to engage in interstate commerce. While he was driving, Thurman fell asleep, and the truck hit a parked vehicle, causing serious injuries to the occupant, James Gagner. On June 3, 1986, Gagner filed a complaint for damages in state court, naming Caulfield, Thurman, and Axel's as defendants.

At the time of the accident, Axel's was insured by Fireman's Fund Insurance Co. ("Fireman's"); and Caulfield and Thurman were both insured by Millers National Insurance Co. ("Millers"). The lease under which Axel's was operating stated, "The Contractor [Caulfield] shall hold Carrier [Axel's] harmless from any loss or damage incurred by Carrier as a result of the negligent operation, maintenance, or best use of the vehicles . . . . The Contractor shall maintain continuous insurance coverage sufficient to hold Carrier harmless."

A settlement was reached in the *Gagner* action. Fireman's contributed $450,000 towards settlement on behalf of its insured, Axel's. Millers contributed $200,000 on behalf of its insureds, Caulfield and Thurman. The settlement was premised on the reservation of each party's rights and obligations

regarding coverage and liability, to be determined at a later time.

On October 10, 1986, Millers filed a complaint in federal district court against Axel's and Fireman's for damages and a judicial declaration that Axel's was exclusively liable for the damages claimed by Gagner and that, as Axel's insurer, Fireman's was responsible for primary coverage of the Gagner claim. Fireman's counterclaimed,[1] requesting a judicial declaration that Caulfield and Thurman were exclusively liable for the accident and that Millers was responsible for primary coverage of the loss and Fireman's responsible only for excess coverage.

The district court dismissed the action for lack of subject matter jurisdiction. There was no diversity of citizenship between the parties, and the court did not find the existence of a federal question sufficient to invoke jurisdiction under 28 U.S.C. § 1331 (1982).[2] This appeal was taken by Millers. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). The sole issue on appeal is whether the district court had jurisdiction over the dispute. The existence of subject matter jurisdiction presents a question of law reviewable *de novo*. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986).

DISCUSSION

Millers argues that jurisdiction exists because the determi-

[1]Though Fireman's contested federal jurisdiction over the action brought by Millers, it counterclaimed in the event that the court found jurisdiction. In its counterclaim, Fireman's stated that it did not concede the jurisdictional issue.

[2]That section states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

nation of insurance coverage rests on which party is primarily liable for the accident. This underlying liability, Millers contends, is governed by federal law. While Millers acknowledges existence of the indemnity clause in the lease, whereby Millers' insured agreed to hold Axel's harmless for liability, Millers disputes the validity of this indemnity clause based on federal regulations. The argument appears to be that federal law governs the question of liability for the accident, and any indemnification agreement which would allocate liability contrary to federal law is not valid.

[1] The truck involved in this case was a leased vehicle engaged in interstate commerce, regulated under 49 U.S.C. § 10101 *et seq.* Under 49 U.S.C. § 10927, a motor carrier such as Axel's may not operate in interstate commerce unless it files an insurance policy or other type of security in compliance with applicable regulations. The security must be sufficient to pay "for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles" subject to regulation. 49 U.S.C.A. § 10927(a)(1) (1988). The purpose of this law is "to assure to members of the public . . . that a certificated carrier has independent financial responsibility . . . to pay for losses created by its carrier operations." *Carolina Casualty Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304, 312 (5th Cir. 1978) (discussing section 215 of the Interstate Commerce Act, 49 U.S.C. § 315, which 49 U.S.C.A. § 10927(a)(1) supersedes).[3] Some courts have held, based on the federal statute and regulations, that the carrier is liable for injuries caused by the leased vehicle. *See Grinnell Mutual Reinsurance Co. v. Empire Fire & Marine Ins. Co.*, 722 F.2d 1400, 1404 (8th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984)

[3]To implement this statutory requirement, the ICC requires the motor carrier to file proof of adequate insurance. The carrier must attach form BMC 90 to the carrier's insurance policy; the form acts as an endorsement, stating that the carrier's policy provides the required coverage. At the time of the accident in question, Axel's was properly certified by the ICC.

("[T]he ICC regulations . . . make a carrier liable to the public for negligent acts of the vehicle's driver . . . ."). *See also Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983). Millers contends that, since Axel's arguably would be liable for the accident under federal law,[4] its insurer, Fireman's, is responsible for primary coverage. According to Millers, this case "arises under" federal law because the determination of insurance coverage follows directly from the underlying determination of liability, which itself is governed by federal law.

[2] In essence, Millers' claim for indemnity is a state law claim. Though its resolution may involve a determination of federal law, that alone is not sufficient to invoke federal-question jurisdiction. We believe this case falls squarely within the Supreme Court's holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 106 S. Ct. 3229 (1986).

In *Merrell Dow*, the plaintiffs brought an action in state court against a drug manufacturer, alleging that the drug caused multiple birth defects in a child. In one of the six counts, plaintiffs alleged that the drug was misbranded in violation of the Federal Food, Drug, and Cosmetic Act, ("FDCA") and that such violation constituted a rebuttable presumption of negligence in the state law action. The case was removed to district court.

Denying the plaintiffs' motion to remand, the district court found that federal-question jurisdiction was invoked by virtue of plaintiffs' reliance on the defendant's violation of federal law. The Supreme Court reversed, holding that the case did not arise under federal law. It began its analysis by noting that "the vast majority of cases brought under the general

[4]Millers points out that although Gagner's claim has been settled, the issue of liability between Axel's and Caulfield has not been resolved. The settlement was contingent upon reserving the parties' rights and obligations regarding liability and coverage issues.

federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Id.* at 3233. The court pointed to the "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 3235. The Court noted that the federal law in that case (the FDCA) did not create any of the causes of action asserted by the plaintiffs, but rather, the case involved "the presence of a federal issue in a state-created cause of action." *Id.* at 3233. It concluded, "[A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.' 28 U.S.C. § 1331." *Id.* at 3237.

We had occasion to interpret *Merrell Dow* in *Utley v. Varian Associates, Inc.*, 811 F.2d 1279 (9th Cir.), *cert. denied*, 108 S. Ct. 89 (1987). There we explained, "Under *Merrell Dow*, if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question" sufficient to confer federal-question jurisdiction. *Utley*, 811 F.2d at 1283.

We found that federal-question jurisdiction did not exist in *Utley*. In that case, Utley brought a state law employment discrimination action against his employer. The case was removed to federal court. In one claim, Utley alleged that his employer dismissed him because of his race, in violation of the employer's affirmative action duties as a federal contractor under a federal Executive Order. He contended that such violation amounted to an unlawful employment practice under section 12940 of the California Government Code, which prohibits employers from discharging employees on the basis of race. Applying the *Merrell Dow* analysis, we examined whether the federal Executive Order upon which Utley's state claim was predicated provided a private right of action. We stated, "Only if the executive order provides Utley

with a private right of action against [his employer] in federal court might his complaint raise a 'substantial' federal question permitting . . . jurisdiction." *Id.* at 1284. We found that no such private right of action existed and, accordingly, held that the state claims did not raise a substantial question of federal law sufficient to confer federal jurisdiction under *Merrell Dow*. *Id.* at 1286.

[3] We approach this case under the same analysis. The proper inquiry is whether the federal statute involved in Millers' state claim provides a private right of action. Millers' claim is predicated upon federal law governing interstate carriers. We have previously noted that "Congress and the ICC, through authorizing statutes and regulations, intended to impose financial responsibility requirements upon authorized carriers to protect the public." *Planet Ins. Co. v. Transport Indemnity Co.*, 823 F.2d 285, 286-87 (9th Cir. 1987). But though the regulations require the carriers to hold insurance to assure financial responsibility toward members of the public, there is nothing in the regulations or the statute that deals with the question of allocating liability between the insurers of an owner and a carrier. *See Grinnell*, 722 F.2d at 1404. We are convinced that Congress, in enacting the statute, did not intend to provide a federal private right of action to insurers of carriers for indemnification against insurers of equipment owners. Because Millers possesses no private right of action under federal law, the fact that federal law might be an element in its state law claim is not sufficient to present a federal question supporting jurisdiction under 28 U.S.C. § 1331.[5]

[5]We also reject Millers' argument that jurisdiction is conferred by 28 U.S.C. § 1352 (1982), which provides: "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States . . . ." Millers argues that the insurance required by 49 U.S.C. § 10927 and 49 C.F.R. § 1043 is a type of security which falls under 28 U.S.C. § 1352. Insurance, however, is not normally thought of as a "bond" as that term is commonly used. Moreover, even if insurance could be thought of as a "bond" as the term is used in section 1352, this is not an "action on a bond." Rather, it is an action for indemnification brought by one insurer against another. This action follows the underlying state court action filed by Gagner. That action resembles, far more than this one does, an "action on a bond."

The district court's judgment is **AFFIRMED.**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILLERS NATIONAL INSURANCE COMPANY; JOHN CAULFIELD, dba, Caulfield Trucking; DONALD PRESTON THURMAN,	)	No. 87-6606
	)	D.C. No. CV-86-6592-AWT
Plaintiffs-Counter-Defendants-Appellants,	)	ORDER
and	)	FILED JULY 28, 1988
INTERSTATE TRUCK UNDERWRITERS, INC.	)	
Plaintiff-Counter-Defendant,	)	
vs.	)	
AXEL'S EXPRESS, INC.	)	
Defendant-Appellee,	)	
FIREMAN'S FUND INSURANCE COMPANY,	)	
Defendant-Counter-Claimant-Appellee.	)	

Appeal from the United States
District Court for the Central District
of California

Before: HUG, KOZINSKI, and THOMPSON, Circuit Judges.

The panel, as constituted in the above-entitled case, has voted to deny the petition for rehearing.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILLERS NATIONAL INSURANCE COMPANY, et al., Plaintiffs, vs. AXEL'S EXPRESS, INC., et al., Defendants.	NO. CV 86-6592 AWT FURTHER ORDER TO SHOW CAUSE RE JURISDICTION
AND RELATED COUNTERCLAIM.	

Based upon plaintiffs' memorandum, filed August 19, 1987 (to which defendants have not responded), the Court is satisfied that it has subject matter jurisdiction, but only with respect to limited aspects of the controversy.

The dispute as between plaintiffs Caulfield and his driver Thurman and

defendant Axel's Express appears to "arise under" 49 U.S.C. §11107(a)(4) and the regulations promulgated thereunder, 49 C.F.R. Part 1057. See Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983).

However, the rights and obligations of the various insurance carriers--plaintiffs Miller National Insurance Company and Interstate Truck Underwriters, Inc., and defendant Fireman's Fund Insurance Companies--appear to be governed by the terms of the respective policies. Any liability of any insurer is derivative only, based on the liability of its insured and the coverage afforded. It does not appear that insurance carriers are governed by Title 49 of the U.S. Code or the C.F.R. In fact, under the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq., regulation of the business of insurance is left

expressly to the States.

There is no complete diversity of citizenship here so as to give this Court subject matter jurisdiction under 28 U.S.C. §1332. Therefore, the controversy with respect to coverage is a pendent claim -- pendent to the claim between the regulated truckers. The insurance carriers are pendent parties. This circuit does not recognize pendent party jurisdiction and that rule applies to pendent party insurers. Carpenters So. Cal. Admin. Corp. v. D & L Camp Constr. Co., 738 F.2d 999 (9th Cir. 1984) (doctrine applied to pendent party claim against surety).

The Court believes in these circumstances that, although it can proceed to adjudicate the dispute between the truckers, all insurance company parties must be dismissed.

IT IS ORDERED:

1. The parties shall show cause in writing by September 25, 1987, why all insurance company parties should not be dismissed without prejudice for lack of subject matter jurisdiction.

2. This order to show cause is set for hearing on October 5, 1987, at 10:00 a.m.

3. Should a partial dismissal be ordered, the parties should be prepared to address the issue of whether they desire the remainder of the controversy (as between the truckers) to proceed in this forum.

Dated: September 14, 1987

A. WALLACE TASHIMA
United States District Judge

49 USCS §10101. Transportation policy

(a) To ensure the development, coordination, and preservation of a Transportation system that meets the transportation needs of the United states including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes-

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions

among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry our the policy of this section.

(Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1337)

49 USCS §10927. Security of motor carriers, brokers, and freight forwarders

(a)(1) The Interstate Commerce Commission may issue a certificate of permit to a motor carrier under section 10922 or 10923 of this title [49 USCS § 10922 or 10923] only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate of permit, of for loss or damage to property (except property referred to in paragraph (3) of this subsection, or both. A certificate or permit remains in effect only as long

as the carrier satisfies the requirements of this paragraph.

49 USCS §11107. Leased motor vehicles

(a) Except as provided in section 11101(c) of this title [49 USCS §11101(c)], the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 11521 et seq.], that uses motor vehicles not owned by it to transport property under an arrangement with another party to-

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier'

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and

obtain liability and a cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with applicable law as if the motor vehicles were owned by the motor carrier.

(b) The Commission shall require, by regulations, that any arrangement, between a motor carrier or property providing transportation subject to the jurisdiction of the Commission under subchapter II of the chapter 105 of this title [49 USCS §§ 11521 et seq.], and any other person, under which such other person is to provide any portion of such transportation by a motor vehicle not

owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

(As amended July 1, 1980, P.L. 96-296, § 15(d), 94 Stat. 809.)

49 CFR § 1043.6 Bonds and certificates of insurance.

(a) Public liability. Each Form BMC 82 surety bond filed with the Commission must be for the full limits of liability required under § 1043.2(b)(1). Form MCS-82 surety bonds and other forms of similar import prescribed by the Department of Transportation, may be aggregated to comply with the minimum security limits required under § 1043.2(b)(1) or §1043.2(b)(2). Each Form BMC 91 certificate of insurance filed with the Commission will always represent the full security minimum limits required for the particular carrier, which it remains in force, under § 1043.2(b)(1) or § 1043.2(b)(2), whichever is applicable. Any previously executed form BMC 91 filed before the current revision which is left on file with the Commission after the

effective date of this regulation, and not canceled within 30 days of that date will be deemed to certify the same coverage limits as would the filing of a revised Form BMC 991. Each Form BMC 91X certificate of insurance filed with the Commission will represent the full security limits under § 1043.2(b)(1) or § 1043.2(b)(2) or the specific security limits of coverage as indicated on the face of the form. If the filing reflects aggregation, the certificate must show clearly whether the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.* Each Form BMC 91MX certificate of insurance filed with the Commission will represent the security limits of coverage as indicated on the face of the form. The Form BMC 91MX must show clearly whether

the insurance is primary or, if excess coverage, the amount of underlying coverage as well as amount of the maximum limits of coverage.

49 CFR Subpart B-Leasing Regulations

§ 1057.11 General Leasing requirements.

Other than through the interchange of equipment as set forth in §1057.31, and under the exemptions set for the in the Subpart c of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) Lease-There shall be a written lease granting the use of the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(b) Receipts for equipment-Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it

shall given the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraphy, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, it shall obtain a receipt from the owner.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) Identification of equipment-The authorized carrier acquiring the use of the equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's

requirements in Part 1058 of this chapter (Identification of Vehicles). Upon termination of the lease, the authorized carrier shall remove all identification showing in as the operating carrier before giving up possession of the equipment.

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease operated by it. The statement shall also specify the name of the owner, the date and the of lease, any restrictions in the lease relative to the commodities to transported, the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) Records of equipment-The authorized

carrier using equipment leased under this section shall keep records of he equipment as follows:

(1) The authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point or origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Leases which contain the information required by the provisions in

this paragraph may be used and retained instead of such documents or papers. As to lease agreements negotiated under a master lease, this provision is complied with by having a copy of a master lease in the unit of equipment in question and where the balance of documentation called for by this paragraph is included in the freight documents prepared for the specific movement.

(2)[Reserved]

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47259, Dec. 3 1984; 49 FR 4785, Dec. 7, 1984; 50 FR 24549, June 12, 1985]

49 CFR § 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) Parties-The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) Duration to be specific-The lease shall specify the time and date of the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b).

(c) Exclusive possession and responsibilities-(1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessees shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purposes of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Commission, the parties may provide in the lease that the

provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

(d) Compensation to be specified-The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative or the lessor may accept these documents. the amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed

upon by the parties to the lease. the compensation stated on the lease orig the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(e) Items specified in lease. The lease shall clearly specify the responsibility of each party with respect to the costs of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and unused portions of such items. The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service. Except when the violation results from the acts or omissions of the lessor, the authorized carrier lessee shall assume the risk and costs of fines

for overweight and oversize trailers when the trailers are reloaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted over dimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor. If the authorized carrier is authorized to receive a refund or a credit for base plates purchased by the lessor from, and issued in the name of, the authorized carrier to another lessor the authorized carrier shall refund to the initial lessor on whose behalf the base plate was first obtained a prorated share of the amount received.

(f) Payment period. The lease shall specify that payment to the lessor shall be made within 15 days after submission of the necessary delivery documents and

other paperwork concerning a trip in the service of the authorized carrier. the paperwork required before the lessor can received payment is limited to log books required by the Department of Transportation and those documents necessary for the authorized carrier to secure payment form the shipper. The authorized carrier may require the submission of additional documents by the lessor but not as a prerequisite to payment. Payment to the lessor shall not be made contingent upon submission of a bill of lading to which no exceptions have been taken. The authorized carrier shall not set time limits for the submission by the lessor of required delivery documents and other paperwork.

(g) Copies of freight bill-Subject to the right of the authorized carrier to delete the names of shippers and

consignees shown on the freight bill, the lease shall specify that the authorized carrier shall give a copy of the rated freight bill before or at the time of settlement to those lessors whose revenue is based on a percentage of the gross revenue for a shipment. The lease shall clearly specify the right of the lessor, regardless of method of compensation, to examine copies of the carrier's tariff.

(h) Charge-back items. The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

(i) Products, equipment, or services from authorized carrier-The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation form purchase or rental payments.

(j) Insurance-(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is

responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in the manner, the lease shall specify that the authorized cagier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name and of the insurer the policy

number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may ge made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of many owed to the lessor. the written explanation and itemization must be delivered to the lessor before any deductions are made.

(k) Escrow funds-If escrow funds are required, the lease hall specify:

(1) The amount of any escrow fund or performance bond required to e paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform the accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly

basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in he lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(1) Copies of the lease--An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in §1057.11(c)(2) is carried on the

equipment shall keep the other copy of the lease.

(m) This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)-(k) of this section. This is true regardless of whether the lease for the equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation. (49 U.S.C. 10321, and 11107; 5 U.S.C.

553)

[44 FR 4681, Jan. 23, 1979, as amended at 45 FR 13092, Feb 28, 1980; 47 FR 28398, June 30, 1982; 47 FR 51140, Nov. 12, 1982; 47 FR 54083, Dec. 1,1982; 49 FR 47851, Dec. 7, 1984]